

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of)	
)	
Opinion requested by)	No. O-04-226
John St. Croix)	March 21, 2005
)	
)	
)	
)	
)	

BY THE COMMISSION: John St. Croix, Executive Director of the Ethics Commission City and County of San Francisco has requested an opinion of the Fair Political Practices Commission on the following questions:

I. Questions

- (1) Does section 85501 of the Political Reform Act (“Act”)¹ prohibit a candidate (or multiple, coordinating candidates) from funding and sending a mailing urging voters to rank one candidate in the first-choice position and two other candidates as the second and third choices in an election where there is only one winner?
- (2) May three candidates combine their campaign funds to pay for such a mailer? If so, how is the cost allocated?

II. Conclusions

- (1) The mailings are not prohibited by section 85501 because they are not independent expenditures to support or oppose other candidates if the mailings are sent for the purpose of promoting the mailing candidate’s own candidacy in a single-seat election and not the candidacy of another.
- (2) Three candidates are permitted to combine their funds to finance the mailing. Full and adequate consideration must be provided for each section of the mailer or a contribution may result. The division of the cost of the mailing should be done by calculating a pro-rata share based on the candidate’s space in the mailing. For example, the cost would be divided equally in a case where each candidate has equal space on the flyer.

¹Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109 – 18997, of the California Code of Regulations. All further statutory references are to the Government Code, unless specified otherwise.

III. Facts

San Francisco has adopted a new voting system called Ranked-Choice Voting (“RCV”) to elect candidates for Mayor, Sheriff, District Attorney, City Attorney, Treasurer, Assessor-Recorder, Public Defender, and members of the Board of Supervisors. RCV was used for the first time in the November 2004 election. RCV allows a candidate to be elected by a majority vote without the need for a separate run-off election. RCV is only used for single-seat elections (i.e., races with only one winner). Voters elect these officials by ranking three different candidates in order of preference. If any candidate receives an absolute majority of the votes, then that candidate is declared the winner. If no candidate receives an absolute majority, then the candidate who received the smallest number of first choice votes is eliminated and the voters who selected the eliminated candidate as their first choice will have their votes transferred to their second choice. The votes are then recounted, and any candidate receiving a majority is declared the winner. If no candidate has yet obtained an absolute majority of the votes, then the process of eliminating candidates and transferring votes is repeated until one candidate has an absolute majority.

Certain candidates wish to send out mailers telling voters where candidates should be placed for each of the three positions (first choice, second choice, third choice). The candidates would like to send out these mailers both individually and in cooperation with other candidates in order to share the costs. The staff of S.F. Ethics has prepared a draft opinion letter concluding that section 1.122 of the San Francisco Campaign and Governmental Conduct Code (“S.F. Code”) permits a candidate to expend campaign funds only when the primary purpose of such expenditures is to support his or her own candidacy, or for expenses associated with holding office. Under section 1.122 of the S.F. Code, a candidate may not use campaign funds when the primary purpose of the expenditure is to urge voters to elect another candidate to public office.

The prohibition in section 85501 of the Act has been incorporated into the S.F. Code as section 1.106. S.F. Ethics asks whether the Commission would consider any expenditure for a communication by one candidate that urges voters to support that candidate as the first choice - and two others for the second and third choices – to be an independent expenditure that supports or opposes another candidate within the meaning of section 85501. S.F. Ethics also inquires on behalf of certain candidates as to how costs should be allocated if such mailings are permissible.

IV. Analysis

QUESTION ONE: Does section 85501 of the Act prohibit a candidate (or multiple, coordinating candidates) from funding and sending a mailing urging voters to rank that candidate in the first-choice position and two other candidates as the second and third choices in an election where there is only one winner?

Section 85501 provides as follows:

“A controlled committee of a candidate may not make independent expenditures and may not contribute funds to another committee

for the purpose of making independent expenditures to support or oppose other candidates.”

To examine this section as it applies to RCV, we will look at the elements of the statutory language. The statute can be broken down into three main components:

- (1) A controlled committee of a candidate;
- (2) An independent expenditure; and,
- (3) The purpose of supporting or opposing other candidates.

In order for section 85501 to apply, all three elements must be found. Whether these elements are present in a particular case is a question of fact.

Controlled committee of a candidate: The statute applies only to controlled committees of candidates. In this case, we are asked about candidates sending mailers, so this element of section 85501 is present.

An independent expenditure: Next, we must determine whether the mailing would constitute an independent expenditure. An independent expenditure is defined in section 82031 as:

“...an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.”

Both the S.F. rule and section 85501 prohibit independent expenditures which support or oppose another candidate. Independent expenditures also have three distinct elements:

- (1) There must be an “expenditure” as defined in section 82025;
- (2) The expenditure must fund a communication that expressly advocates the election or defeat of a clearly identified candidate; and,
- (3) The communication must not be made at the behest of the other candidate or committee (i.e., made in coordination with them).

RCV in San Francisco is limited to races in which there is only one winner. The possible scenarios presented by the opinion request include:

- (1) The mailing is coordinated between all of the candidates included in the mailing, or
- (2) The mailing is done independently by one candidate.²

In facts presented in this opinion request, we are discussing expenditures made for communications (mailings) that rank three candidates in an election; therefore, the first two elements of an independent expenditure are present. The mailings constitute expenditures that expressly advocate the election or defeat of a clearly identified candidate.

For the third element, the general rule is that when an expenditure is coordinated with another candidate, it is made at the behest of that candidate and therefore is not an independent expenditure. (See section 85500 and regulations 18225.7 and 18550.1.) As a result, mailings that are coordinated between the three candidates are made at the behest of the other candidate or committee (i.e., are made in coordination with them) and are not prohibited by section 85501 because they are not independent expenditures.

In the first scenario proposed, where the mailing would be coordinated by the three candidates, the mailing would not qualify as an independent expenditure by any of the candidates since it is a coordinated effort, and in those cases, section 85501 would be inapplicable.

Where the mailing is coordinated by the three candidates but is paid for by only one, the mailings would be considered a contribution from the candidate who paid for the mailing to the other two candidates included in the mailing. The term “contribution” is defined in the Act and Commission regulations as any payment received by--or made at the behest of³--a candidate, unless the candidate provides equal or greater consideration for the payment or the payment is for personal purposes unrelated to his or her candidacy or status as an officeholder. (Section 82015; regulation 18215.) The term “expenditure” is defined in the Act and Commission regulations as any payment made by a candidate unless the payment is for personal purposes unrelated to his or her candidacy or status as an officeholder. (Section 82025; regulation 18225.)

A candidate who makes a payment to rank another candidate in his own mailing is making a reportable expenditure in the form of a contribution to the other candidate if the expenditure is made at the behest of (in coordination with) the candidate included in the mailing unless an exception applies.⁴ Thus, expenditures made at the behest of a candidate or committee are reportable as contributions. By contrast, if the three candidates split the cost of the mailer

² Although the question is not asked, it should be noted that mailings could still be independent expenditures where Candidates A and B coordinate and include a ranking of Candidate C, but Candidate C does not coordinate the mailing. The analysis for independent mailings should be applied to test the applicability of section 85501.

³ “Made at the behest of” means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, or at the request or suggestion of” a candidate, controlled committee, official committee of a political party, or organization formed or existing primarily for political purposes. (Regulation 18225.7.)

⁴ To determine if an expenditure is “made at the behest of” a candidate, the standards of regulation 18225.7 must be applied.

proportionately, then no contribution would result. In order for there to be no contribution, each candidate would have to pay full and adequate consideration for his or her portion of the mailer.

In the second scenario proposed, where one candidate is sending the mailing independently, a plain reading of the statute would indicate that the mailing would be an independent expenditure since the mailing “expressly advocates the election or defeat of a clearly identified candidate.” (Section 82031.)

The purpose of supporting or opposing other candidates: This element of section 85501 prohibits candidates from using their own campaign funds for the purpose of getting another candidate elected. We note that this is broader than the definition of “independent expenditure.” By urging a certain view to the voters as to how to cast their votes, a literal reading of the statute would indicate that the candidate’s mailing was being sent to “oppose” those candidates who are consigned to the second or third choices. However, we have never applied this interpretation of independent expenditure or section 85501 and, the statute, as written, is ambiguous in its application to RCV. Although the language appears clear and unambiguous on its face, when applying this language to the intricate new voting system, it seems to come to an absurd conclusion since campaign strategy is not taken into consideration. In fact, we have generally concluded to the contrary.

For example, in our state and local campaign manuals, we state that no independent expenditure is made when a candidate pays for a communication under the following circumstances:

- (1) The mailing supports another candidate;
 - (2) It is not made at the behest of the endorsed candidate;
 - (3) The mailing includes the candidate who is paying for the communication;
 - (4) The mailing is targeted only to the potential voters in the paying candidate’s district;
- and,

(5) The non-paying candidate is listed on the same ballot as the paying candidate. (State Candidate Campaign Manual, pg. 4-4.)

For example, Candidate Fred sends a mailer stating that he supports the Governor and his agenda so people who support the Governor’s reelection should also support Fred’s candidacy. The mailing is not made at the behest of the Governor and is sent only to Fred’s district. Under the current advice, no independent expenditure has been made by Candidate Fred since all of the criteria necessary pursuant to the campaign manuals are present.

The facts of this opinion state that the San Francisco candidates desire to use these RCV mailings to promote the mailing candidate’s own candidacy for a single-seat race. An example of this may be that if Candidate A knows that Candidate B is his strongest competition, he may send out mailers suggesting that the ranking for the top three be: 1) Candidate A; 2) Candidate C;

and 3) Candidate D. These mailings are unique to the RCV system jurisdiction since the campaign strategy is not only to receive all the first choice votes but the second and third choice votes as well.

The applicability of section 85501 depends on whether the mailing candidate is using the mailing as a strategy to promote his or her own candidacy. Section 85501 would be inapplicable in the instances where the mailing would not be for the purpose of promoting the other candidates, but rather his or her own candidacy since the third criterion of section 85501 would not be met. However, if the purpose of the expenditure was to support or oppose the other candidates in the mailing, then section 85501 would apply and the mailing would be prohibited. Generally, a candidate is not prohibited from attacking his or her opponent in an “independent expenditure.”

Although we have never opined on the type of election used in San Francisco, the rationale applied in previous advice regarding independent expenditures and the nature of the S.F. election suggest that a candidate could send a mailing urging his or her own election and ranking of other candidates if the mailer was done to benefit his or her own candidacy. If these types of mailings in a single-seat RCV race promote the mailing candidate’s own candidacy, even if this objective is achieved by urging a lower ranking of the candidate’s opponents, then section 85501 would not be applicable.

QUESTION TWO: May three candidates combine their campaign funds to pay for the mailer? If so, how is the cost allocated?

Costs should be allocated using the standard for valuing nonmonetary contributions: “[w]henever the amount of goods, services, facilities, or anything of value other than money is required to be reported under this title, the amount reported shall be the fair market value....” (Section 82025.5.) In other words, the amount that would have had to be paid by the candidate or committee to acquire similar goods or services on the open market. This standard should be used to assist in determining when a candidate is paying his or her equal share of the mailing. To ascertain what the amount would be if a candidate would like to make a full and adequate payment of his or her portion of a mailer with multiple candidates so that no contribution results, he or she would:

- (1) Divide the total cost of producing the mailer by the number produced.
- (2) Multiply that figure by the number of mailers sent on behalf of that candidate or measure.
- (3) Calculate the prorated cost of the amount of space allotted to each candidate supported or opposed in the mailer.⁵

⁵ This is the same method used to ascertain the value of the nonmonetary contributions received by candidates when an organization sends out a mailer.

Thus, if there were 1,000 mailers produced at a total cost of \$2,400, and Candidate A was the only candidate in the mailer, then the total amount of \$2,400 would be attributable to him or her. If there were multiple candidates in the mailer, then the cost attributable to each candidate is calculated on a pro-rata basis. For instance, if there were 3 candidates on the mailer, then the total cost would be divided by the number of candidates (\$2,400 divided by 3). This assumes that each candidate has equal space on the flyer and that all mailers were sent to the candidate's district. That is the amount of the contribution to each candidate or the amount each candidate would pay as his or her portion of the cost to avoid a contribution being generated.

Adopted by the Commission on March 21, 2005.

Concurring: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

Liane Randolph
Chairman